



County of Yolo

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January 14, 2013

Phil Isenberg, Chairman, and Council Members
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Comments of Yolo County—Proposed Regulations

Dear Chair Isenberg and Council Members:

Enclosed please find the County of Yolo's comments on the regulations that have been proposed to implement policies set forth in the Final Draft Delta Plan (November 2012). The County's comments on the proposed regulations apply equally to the Delta Plan policies from which they are derived. In a separate letter submitted concurrently herewith, the County is also providing comments on the Recirculated Draft Program Environmental Impact Report for the Delta Plan.

We appreciate the opportunity to comment on the proposed regulations. Please do not hesitate to contact Phil Pogledich, Senior Deputy County Counsel, at (530) 666-8275 if you have any questions or comments.

Very truly yours,

Robyn Truitt Drivon
County Counsel


Philip J. Pogledich
Senior Deputy County Counsel

Enclosure

Yolo County's Comments—Text of Proposed Regulations
January 14, 2013

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Section 5001(e)(3)

This subsection defines the phrase "[a]chieving the coequal goals in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." The definition suffers from at least two defects, each of which brings it into conflict with the consistency standard for regulations set forth in Government Code Section 11349(d).

First, the statutory language at issue (i.e., "achieving the coequal goals") refers to the manner in which the coequal goals are to be implemented. The definition, however, focuses primarily on general concepts of protecting and enhancing certain values. A statement of concepts--for example, "[d]esignate the Delta as a special place worthy of natural and state attention" in subsection (e)(3)(A)--is of little value unless the implementation of those concepts is linked to implementation of the coequal goals. This linkage is central to the statutory language that Section 5001(e)(3) purports to define, as the County has previously explained. (See Yolo County letter commenting on the Final Staff Draft at p. 2 (June 13, 2012)). Its omission results in truncated and invalid definition of a critical component of the Delta Reform Act.

Second, the definition states in part that the "values" referenced in the statutory language at issue "can be preserved and enhanced while accommodating these changes . . ." (i.e., changes associated with implementing the coequal goals). The use of permissive language in purporting to define a statutory mandate is inappropriate. In effect, this permissive language converts the original statutory mandate into a mere consideration of no binding effect. This approach plainly violates the consistency standard.

Section 5001(i)

This subsection defines the term "encroachment" as any "obstruction or physical intrusion" in a floodplain or floodway, even including the planting or (oddly) removal of vegetation. This definition is unnecessary, duplicative, and overly broad.

First, this definition is unnecessary because state law already vests the Central Valley Flood Protection Board (and local governments, under the Cobey-Alquist Act) with comprehensive regulatory authority to address encroachments in floodplains and floodways. There is no credible reason for the Delta Stewardship Council to claim precisely the same regulatory role for itself. This definition and related provisions of the draft regulations thus violate both the necessity and nonduplication standards for regulation set

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forth in Government Code Section 11349(a) and (f).

Second, the definition is overly broad because it includes literally every activity that could occur in a floodplain or floodway, even activities that plainly are not "encroachments" under any sensible definition of the term. In theory, even routine agricultural practices such as planting crops, removing invasive weeds, and installing wells would constitute encroachments under this definition and theoretically fall within the regulatory reach of the Delta Stewardship Council. For these reasons, the definition is beyond the statutory authority of the Council as it would effectively expand the power of the Council to include a range of activities beyond the ambit of the Delta Reform Act.

Section 5001(n)

This subsection defines the term "floodway," a term that is already defined in other provisions of state law. For example, regulations adopted by the Central Valley Flood Protection Board--which has comprehensive regulatory authority over floodways--define both "designated floodway" and "floodway." (*See* 23 Cal. Code Regs § 4.) There is no need for the Delta Stewardship Council to adopt a parallel definition of this term or, more importantly, create a duplicative regulatory process relating to encroachments and other activities in floodways.

Section 5003

This section defines the term "covered action," which is already defined in state law. At least in part, the definition is thus duplicative of Water Code Section 85057.5 and in conflict with the nonduplication standard (Government Code Section 11349(f)). With one exception, however, the County does not object to the inclusion of a regulatory definition of "covered action" and believes that certain language in the regulatory definition is useful to clarify Section 85057.5.

The one exception relates to subsection (c) of Section 5003, which states that public agency covered action determinations must be "reasonable, made in good faith, and consistent with the Delta Reform Act and this chapter." Only the final part of this language (relating to consistency with the Delta Reform Act and related regulations) is appropriate. Put simply, it makes no difference whether an agency acts reasonably or in good faith in making a covered action determination--it matters only whether the determination is correct. Moreover, inquiries into the "good faith" or "reasonableness" of public agency decision makers are barred by the deliberative process privilege and long-established principles of law (*e.g.*, Board of Supervisors of Los Angeles County v. Superior Court, 32 Cal. App. 4th 1616, 1623 (1995); County of Los Angeles v. Superior Court, 13 Cal.3d 721 (1975)). This language is thus unnecessary and beyond the authority of the Council.

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Section 5004

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5004 of the proposed regulations. In addition, the County offers the following specific comments.

Subsection (b)(2) states that "[c]overed actions not exempt from CEQA must include applicable feasible mitigation measures identified in the Delta Plan's Program Environmental Impact Report . . . or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective." The County has two objections to this approach.

First, under CEQA, mitigation is only required for significant impacts. This provision does not appear to incorporate that limitation. To eliminate this inconsistency with CEQA, this provision should (at a minimum) therefore be modified to state that the mitigation requirement applies only to the significant impacts of a covered action.

Second, the County reiterates its prior objection that this requirement is legally untenable. (*See* Yolo County Comment Letter on Final Staff Draft Delta Plan, p. 7 (June 13, 2012).) Under CEQA, mitigation measures adopted as part of the overall "program" studied in an EIR apply only to projects undertaken in furtherance of that program. Many covered actions, however, are primarily *regulated by* the Delta Plan rather than undertaken *in furtherance* thereof. State or local agencies will typically serve as lead agencies, not responsible agencies, for such projects under CEQA. For agencies acting in this capacity, mitigation measures adopted by the Council based on the Delta Plan EIR are legally irrelevant under CEQA. Those agencies have an independent, existing legal obligation under CEQA to mitigate the significant impacts of projects they carry out or approve. Subsection (b)(2) is thus unnecessary, in conflict (among other things) with the role of lead agencies for individual projects under CEQA, and beyond any legal authority conferred upon the Council by the Delta Reform Act.

Section 5005

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5005 of the proposed regulations.

Section 5007

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5007 of the proposed regulations.

Section 5008

This section relates to the restoration of habitat at "appropriate elevations." The County objected to earlier versions of this policy in the Delta Plan. We note, however, that this policy has significantly evolved (even from the final Staff Draft released on May 14, 2012) and that it no longer automatically precludes any habitat restoration activity that may be inconsistent with the elevation map shown in Appendix 4 of the regulations. Rather, Section 5008

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designates the map as a "guide" and it establishes the *Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions* (DFG 2011) as the key reference in determining the suitability of individual restoration projects.

The County generally believes this approach is far more appropriate than those discussed in earlier drafts of the Delta Plan. Nonetheless, the need for any regulatory oversight of this particular issue is questionable. In the absence of substantial evidence that this policy will discourage projects that would otherwise cumulatively threaten the achievement of the coequal goals, it is doubtful that the Delta Reform Act can be read to vest the Council with authority to adopt such a regulation. The County encourages the Council to reconsider whether regulatory oversight of this subject is presently necessary or appropriate.

Additionally, as set forth in San Joaquin County's comments on Section 5008, the County does not believe that subsection (a) of the proposed regulation meets the clarity standard set forth in Section 11349(c) of the Government Code. In particular, it is not clear what it means to designate the referenced map as a "guide" to habitat restoration, nor is it clear how consistency should be measured.

Section 5009

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5009 of the proposed regulations, as applicable to priority habitat restoration areas designated within Yolo County. In addition, the County offers the following comments on proposed Section 5009.

This section requires "significant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4" to be avoided or mitigated. Importantly, Section 5009 includes language from the final Staff Draft of the Delta Plan that tempers the effect of this policy by requiring consideration of the probability of future restoration in determining the need for mitigation. This language reduced the County's principal concern with prior versions of this policy, as expressed in various comment letters on the fifth and earlier staff drafts of the Delta Plan.

Despite this, as with Section 5008, above, the County questions both the necessity and authority for Council oversight of this issue and encourages the Council to reconsider these issues. Section 5009 is also vague as to how the probability of future restoration should be weighed in determining the need for mitigation. It thus appears to present some serious interpretive issues for the Department of Fish and Game and other state and local agencies to confront in the years to come. Much of this could be avoided by simply

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revising Section 5009 to state that it applies only when a restoration project is "reasonably foreseeable," as the County suggested in commenting on the Fifth Draft of the Delta Plan in a letter dated September 30, 2011. We respectfully encourage the Council to consider this clarification.

Section 5010

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5010 of the proposed regulations.

Section 5011

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5011 of the proposed regulations.

Section 5012

This section limits "new urban development, including residential, commercial, and industrial uses," to certain locations that are already developed (including the legacy towns) or designated for development in local general plans. The intended meaning of the term "urban development" is far from clear.

A broad interpretation of this term would encompass even the construction of a single residence or commercial facility. However, other proposed regulations (e.g., Section 5015, regulating residential subdivisions of five or more lots) would be unnecessary if such an interpretation were intended. This leaves the County perplexed as to what level (i.e., density and intensity) of "urban development," exactly, is within the scope of Section 5012.

One potential approach to resolving this clarity issue is to simply modify Section 5012 to refer to "significant levels of new urban development." While certainly not as clear as a quantitative standard, this language would provide considerable guidance to affected agencies while also eliminating the current inconsistency with Section 5015 and other provisions of the draft regulations. Such an approach would be in keeping with the apparent objective of Section 5012 (i.e., to allow only very limited new urban development in the Delta) and elements of the statutory definition of "covered action" in Water Code Section 85057.5, including its limitation to actions that "[w]ill have a significant impact on achievement of one or both of the coequal goals"

Finally, aside from the foregoing issues, the County recognizes that unlike earlier versions of the Delta Plan policy on which this regulation is based, Section 5012 does not apply to "commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms, which are otherwise consistent with this chapter." This change, by itself, resolves the County's main concern with earlier versions of the policy underlying this proposed regulation. The County greatly appreciates the Council's inclusion of this language and its understanding of the need to

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accommodate some development of this nature in rural portions of the Delta.

Section 5013

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5013 of the proposed regulations.

Section 5014

The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5014 of the proposed regulations. In addition, the County offers the following comments.

First, this section calls for the development of "funding priorities" for the investment of state funds in Delta levees by January 1, 2015, based in part on a number of actions set forth in subsection (b). Those actions include various references to "Delta islands" without any reference to other lands in the Delta. Presumably, the limited focus of this draft regulation is in error, as it conflicts with related language in the Delta Plan itself (e.g., p. 277, referring to Delta tracts and islands rather than islands alone). This should be addressed in a revised version of Section 5014.

Second, as the Council is aware, the Department of Water Resources is currently leading a regional flood management planning effort in various throughout the Delta as part of its implementation of the Central Valley Flood Protection Plan and the Delta Reform Act. This effort will result in a number of region-specific plans for flood protection improvements and related matters. This effort appears to implement the same provisions of the Delta Reform Act that the Council is attempting to implement through this regulation. It is not clear, however, that this proposed regulation is entirely in harmony with the DWR effort. The County encourages the Council to review this carefully with DWR to avoid conflicts between projects proposed (and presumably, prioritized) in local plans developed through the DWR effort and the funding priorities established under Section 5014.

Section 5015

This section requires 200-year flood protection for certain residential developments of five or more parcels, primarily including those projects located outside of developed areas or areas designated for development in local general plans. The County reiterates its prior comments regarding this requirement's inconsistency with existing (and relatively recent) statutory provisions requiring only 100-year flood protection. (*E.g.*, Yolo County Comments on Fifth Draft, p. 7 of enclosure (September 30, 2011).) The appropriate level of flood protection for such residential development projects is already the subject of state law, and the Legislature alone has authority to change this requirement.

Section 5017

This section prohibits encroachments in various floodplains, including the entirety of the Yolo Bypass, "unless it can be demonstrated by appropriate

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analysis that the encroachment will not have a significant impact on floodplain values and functions." The County has two objections to this section.

First, the Council's authority ends at the boundaries of the legal Delta. Portions of the Yolo Bypass lying north of Interstate 80 are outside the legal Delta, and thus beyond the regulatory reach of the Council. This section should be modified to acknowledge this limitation.

Second, as noted above, encroachments within the Yolo Bypass are already separately and comprehensively regulated by the Central Valley Flood Protection Board. The County thus reiterates its earlier comments on this issue in the context of Section 5001(i), relating to the necessity of separate regulation by the Council and consistency with the nonduplication standard in Government Code Section 11349(f).